

ORAL ARGUMENT REQUESTED

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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS OF TEXAS

ALLEN BRAY PUGH

Appellant

v.

THE STATE OF TEXAS,

Appellee

On Appeal from the 42nd District Court
of Taylor County, Texas
Cause No. 26,281-A
(Hon. James Eidson)

and

Cause No. 11-17-00216-CR
from the
THE COURT OF APPEALS FOR THE ELEVENTH JUDICIAL DISTRICT
EASTLAND, TEXAS

BRIEF ON THE MERITS

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IDENTITY OF TRIAL COURT, PARTIES AND COUNSEL

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BRIEF ON THE MERITS

**TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL
APPEALS:**

Allen Bray Pugh, (hereinafter sometimes referred to as “Appellant,”) submits
this Brief of Appellant, and would respectfully show unto the Court the following:

STATEMENT REGARDING ORAL ARGUMENT

Pugh gratefully accepts the Court's offer of oral argument.

STATEMENT OF THE CASE

Pugh was charged by indictment with the murder of William Delorme with his motor vehicle. (CR: 10). The offense was alleged to have been committed on October 9, 2014. (CR: 10). On August 16, 2018, the jury found Pugh guilty, having been instructed on and rejecting self-defense. (CR: 38, 50). Punishment, assessed by the jury on August 17, 2017, was confinement for fifty years in the Texas Department of Criminal Justice-Institutional Division and a \$10,000.00 fine. (CR: 57).

Pugh appealed to the Eleventh Court of Appeals at Eastland, Texas. In an opinion authored by the Honorable Justice Keith Stretcher, released on August 30, 2019, the Court affirmed Pugh's conviction. *Pugh v. State*, 11-17-00216-CR (Tex. App. – Eastland, August 30, 2019).

ISSUE PRESENTED

Issue One

The Court of Appeals erred in holding the trial court acted within its discretion when it allowed the State to introduce three animations to the jury which depicted the decedent Delorme as unarmed and stationary, contrary to the evidence.

STATEMENT OF FACTS

This case is generally about a man who was run over by a car in the parking lot of a bar. The jury rejected self-defense, as well as lesser-included offenses of manslaughter and criminally negligent homicide, and convicted Pugh of murder. (C.R. at 50-51).

Alex Schkade was working as a bartender by herself at the Lone Star Bar in Abilene. (RR5: 157). William Delorme, who had been at the Lone Star Bar earlier in the evening, came back to the Lone Star Bar around 11:15 p.m. and had a beer and a shot of liquor. (RR5: 158-159). Delorme was acting strange that night, which unnerved Schkade. (RR5: 160-161). Given her unease around Delorme, Schkade started closing the bar early, around 11:30 p.m. (RR5: 161).

After she had locked the gates, Delorme, who was outside, began yelling at Schkade that he had lost his keys. (RR5: 162). Schkade told Delorme she would look for his keys, which she did. (*Id.*). Schkade told Delorme that she had looked for his keys and could not find them, talking to Delorme through the locked gate. (RR5: 163).

Schkade went back to her duties, and when she heard knocking at the door, she thought it was the person who helps her clean, so she opened the door. (*Id.*). It was actually Delorme, who barged in. (*Id.*). Delorme was yelling while looking for his keys, while Schkade continued counting money at her register. (*Id.*). Schkade turned around, and Delorme had a knife. (*Id.*). Schkade was frightened. (RR5:

164). Delorme was yelling at Schkade, knife in hand, accusing Schkade of having his keys, when Pugh and Pugh's friend, Jesse Hambrick, walked into the bar. (RR5: 164, 180-181; (RR6: 186-187). Delorme had the knife and was "going over the bar trying to get to the bartender." (RR5: 181). Pugh and Hambrick persuaded Delorme to put down the knife. (RR5: 164-165).

Hambrick had experience working as a bouncer in a night club and was attempting to "deescalate the situation." (RR5: 181, 190-191). Pugh stayed with Schkade while Hambrick helped Delorme look for his keys near his truck. (RR5: 165). Another man, Jerry Anderson, a friend of Pugh, also came to the Lone Star Bar from a bar next door. (RR5: 206-208). For some time, Pugh, Hambrick, and Anderson all stayed around the Lone Star Bar and attempted to help Delorme find his keys, as well as to offer protection to Schkade. (RR5: 165, 167-168, 171, 176, 181-183, 195, 208).

Eventually, Delorme left the scene, walking across the street. (RR5: 167, 210). When Schkade left the bar, Delorme was gone. (RR5: 171). The next person to leave was Hambrick, and when he left, Delorme was still gone. (RR5: 193). Anderson and Pugh stood in the parking lot, talking, when they both saw Delorme coming back across the street towards them. (RR5: 211; RR6: 190). Anderson feared that Delorme might have a knife or a gun, and he told Pugh to get in his

truck and leave. (RR5: 211). Anderson immediately got in his car and left. (RR5: 211-212).

As Anderson was driving away, he saw Pugh's taillights and Pugh's vehicle had moved. (RR5: 214-215). At that point, it was undisputed at trial that Pugh got in his truck and drove. It was undisputed that Pugh ran over Delorme, killing him. (RR5: 216; RR6: 193, 215). *How* it happened was disputed. There was testimony, some of it disputed, as to some of the things Pugh said while Delorme was still alive, which go to Pugh's intent. Schkade and the prosecutor had the following exchange:

Prosecutor:

"So prior to him being gone - - or prior to you leaving, did [Appellant] say anything to you about [Delorme] not knowing who he was?"

Schkade:

"Yeah, but, like, I mean, it was just kind of like guys being cocky. Like, you know, oh, he doesn't know who I am. Like it wasn't it didn't seem like threatening to me at the time, it just seemed like more of a macho kind of "

Prosecutor:

"Do you recall what he told you?"

Schkade:

"Yes."

Prosecutor:

"What did he say?"

Schkade:

“He was just like, you know, hey, you know, like if he tries to pull out that knife again, we’ll put him under the car. But like, it wasn’t like, I don’t think he meant it like in that way.”

Prosecutor:

“Okay. So when did he say that?”

Schkade:

“It was, like, after the because, like, they went out and looked for his keys three times, and it was after the second time.”

(RR5: 168)

Schkade also testified that she had said Pugh was going to put Delorme “to sleep and put him under his car,” (RR5: 172); and that Pugh had indicated they should have “done something to [Delorme]. . . like punch him.” (RR5: 176). Schkade further testified that it was not the men’s intent to hurt Delorme but rather to keep her safe and get Delorme out of there. (RR5: 176). When asked if Pugh was intoxicated, Schkade said he was “fine,” that she thought he had “a couple drinks and a couple shots.” (RR5: 166).

Hambrick said that Pugh said, “let’s get him,” which Hambrick testified meant to “deescalate the situation,” (RR5: 182), or to “get him out of there.” (RR5: 184). Hambrick also said Pugh said “let’s get him with a pipe.” (RR5: 185). On cross examination, Hambrick agreed that Pugh might have been saying Delorme was “on the pipe,” meaning on drugs. (RR5: 194). He did say Delorme looked drunk or high. (RR5: 195). Hambrick said that Pugh kept telling him to beat

Delorme up. (RR5: 200). Hambrick said Pugh “kept talking shit to the guy with the knife.” (RR5: 200).

At some point he responded with, “I’m not going to beat this guy up.” (RR5: 185-186). Hambrick said Pugh was “amped up,” and “pacing back and forth,” (RR5: 185, 197), but he also described Pugh as “helping” Delorme to find his keys and “deescalating the situation.” (RR5: 183-184, 196-197).

During his testimony, Hambrick described himself not “amped up,” and “calm,” (RR5: 197), but later said he was amped up and terrified, but that he was trying to remain calm. (RR5: 202). Hambrick said that Pugh “walked [Delorme] over to his car and then followed him across the parking lot . . . all the way to the edge of the street,” as Delorme left. (RR5: 200). Hambrick said that neither he nor Pugh were trying to hurt Delorme; rather, they were just trying to get him away. (RR5: 196). Hambrick was asked if he thought Pugh was sober, and he answered, “no ma’am.” (RR5: 183).

Jerry Anderson testified that Pugh said, “we should knock [Delorme] out or something,” a couple of times (RR5: 209). He also described Pugh as helping look for Delorme’s keys (RR5: 208).

Pugh testified that his comments about Delorme not knowing who he was were in the following context:

Defense Attorney:

“Is [Delorme] still excited is he still threatening at this point?”

Appellant:

“Yes. For some reason, mainly me, he said he knew me. And I don’t know why, I don’t know him.”

Defense Attorney:

“But he was telling you he knew you?”

Appellant:

“Yes. And I was telling him from talking with the few people I was saying, ‘You don’t know me. What are you talking about,’ you know. And he was, ‘I’m going to get you, I’m going to get you.’ And I said, ‘Okay, well, just leave for tonight, just go,’ and he did.”

(RR6: 188-189).

As for the rest of the incident, Pugh testified as follows: he was playing poker with friends at the bar next door to Lone Star Bar. (RR6: 184). He drank two Smirnoff malt beers, and nothing else. (RR6: 185). Pugh and Hambrick went to Lone Star Bar to get a drink, but he never managed to get it. (RR6: 186). When they entered, Pugh and Hambrick saw Delorme threatening the bartender with a knife. (RR6: 187). Delorme looked dazed. (RR6: 187). They yelled at him, which induced him to put the knife to his side and exit. (*Id.*).

Hambrick and Delorme left the building while Pugh stayed with Schkade. (*Id.*). Delorme came back in a threatening manner, still looking for his keys. (*Id.*). Hambrick, Delorme, and Jerry Anderson left to look for his keys.

(*Id.*). Pugh moved his truck in front of Lone Star Bar. (*Id.*). Pugh said that Delorme told him he knew where he lived. (RR6: 190). They encouraged Delorme to leave, and they saw him depart past the median. (RR6: 190). After everyone but he and Anderson departed, they saw Delorme running back across the median towards them. (RR6: 190). He and Anderson decided to leave. (RR6: 192-193). He backed up his vehicle. (RR6: 193).

He made visual contact with Delorme. (*Id.*). Pugh's window being down, Pugh inquired of Delorme regarding his welfare and the reason for his return. (*Id.*). Delorme walked in front of Pugh's truck toward the driver's side door. (*Id.*). Delorme was yelling at Pugh. (*Id.*). Delorme was threatening to kill him and "get" him. (*Id.*). Pugh was backing up at that time. (*Id.*). Delorme lunged with the knife, so Pugh lay over the center console and "floored" the accelerator. (*Id.*). There was a thud, and he saw Delorme through the windshield in front of him. (RR6: 194). He was terrified, and drove off. (*Id.*). He did not think he had run over Delorme at the time. (*Id.*). It was not his intent to hurt him. (*Id.*). He thought Delorme had just grabbed a part of his vehicle and fell off. (*Id.*). He was simply trying to protect himself by leaving. (RR6: 195).

Ernest Moscarelli was the lead detective on the case. On October 9, 2014, he interviewed Pugh, which was recorded and entered into evidence. (SX-71). In

the video, Pugh said some things that were inconsistent with his trial testimony, including that he had been drinking “crown and coke.” (SX-71); (VI R.R. at 197). Most notably, he did not recall hitting Delorme or having him on his hood. (*Id.*). He did not think he had run over Delorme. (*Id.*). But Pugh did say that as Delorme came over to his driver’s side door, he leaned over the center console and hit the accelerator, which was consistent with his trial testimony. (SX-71; RR6: 193).

The medical examiner, Dr. Richard Fries, testified he performed the autopsy on Delorme. (RR6: 25). Most of the injuries were in the area of the chest, torso, and abdomen. (RR6: 26). Additionally, there were many to the face and head, as well as some abrasions to the arms and legs. (*Id.*). Delorme’s ilium, or pelvic bone, was fractured, which, Dr. Fries testified, usually comes from a crushing injury from having been run over. (RR6: 30). He opined that such a fracture would come from being struck or striking something or being run over by a motor vehicle. (RR6: 30-31).

Dr. Fries identified several of Delorme’s injuries that were consistent with being struck by a motor vehicle. (RR6: 37-46). He said that if Delorme had been drug by the car, it was probably only a few feet. (RR6: 49). Both sides of Delorme’s body had traumatic points of impact. (RR6: 52-53). Delorme had a blood alcohol content of 0.209, and tested positive for THC. (RR6: 50).

Members of law enforcement testified about physical evidence at the scene and on the truck, as well as “accident reconstruction” of the events.

Detective Moscarelli said he went to the scene and measured 85 feet of acceleration marks. (RR7: 32).

Officer Randall Farmer identified SX-45, a photograph of the driver’s side tire, and SX-49, a photograph of the driver’s side door just below the door handle. (RR6: 80). The illuminated areas are where Bluestar identified blood.^a (RR6: 80). Farmer identified SX-48, which was a photograph depicting skin and hair under the front driver’s side area. (RR6: 86). Farmer identified SX-55 through SX-57, photographs that depicted more hair and tissue evidence on the undercarriage near the driver’s seat. (RR6: 88-89). A DNA expert later testified that the samples of skin and hair, and two blood samples, one from the bottom of the driver’s door, and one from the driver’s tire, belonged to Delorme. (RR6: 110-111). Farmer also sponsored the admission of SX-22 and SX-24, pictures of the knife and sheath taken at the scene next to Delorme’s body. (RR6: 68).

Officer David Thompson, an Abilene Police Department accident reconstructionist, testified that acceleration marks and not deceleration marks led up to the body. (RR6: 142-143).

^a Bluestar is a chemical agent that reacts with blood and causes blood to illuminate a bright blue color when it comes in contact with blood. (RR6: 79-80).

Abilene Police Officer Tyson Kropp was not called to the scene of the incident, and he never inspected Pugh's vehicle. (RR6: 159, 180, 183). The prosecutor asked him to produce a computer animation months after the incident occurred. (RR6: 159). Kropp testified that Pugh's truck was able to drive between a building and another fixed object, signifying that Pugh had control of the vehicle. (RR6: 173-75). Kropp testified that Delorme's body went under the driver's side of the vehicle, towards the front of the vehicle, where there was a dent in the truck. (RR6: 163, 178). Kropp admitted that he did not know exactly where in the parking lot the truck made contact with Delorme's body. (RR6: 176-177).

Kropp opined that Delorme's body was not on the hood and did not get run over as a result of rolling off the hood, because Kropp could not identify any smears or any disruption of any organic materials such as dust on the hood of the vehicle. (RR6: 180). However, he admitted that this observations was made entirely through photographs of the vehicle, because he never examined the vehicle itself. (RR6: 180, 183). Kropp admitted that there was no DNA found in the front of the vehicle or in front of the driver's side tire. (RR7: 43). The driver's side tire had blood on it. (*Id.*). There was a "distinct rubbed pattern" parallel with the driver's side tire. (*Id.*).

Kropp did not conduct his acceleration tests on the lot in question but at one with a surface he deemed similar. (RR6: 168).

Based on his opinion from inspecting evidence, Kropp had created four computer-generated animation videos. (RR6: 169). In a pretrial hearing, Pugh objected to the admission of the animation based on the fact that it was speculation and also violated TEX. R. EVID. 403. (RR5: 6-8). The trial court allowed three of the animations, but not the fourth, and the three were admitted as SX-69. The trial court gave a limiting instruction. (RR6: 171). All three animations depict Delorme as stationary and unarmed, as opposed to approaching Pugh with a substantial knife. SX-69.

The Court's charge included instructions on self-defense and voluntary intoxication. (C.R. at 34-49).

SUMMARY OF THE ARGUMENT

The Court of Appeals acknowledged precedent from this Court decreeing that animations shall not depict human actions due to the inherently speculative nature of said depictions. *Pugh, supra*, at 5. However, that Court then proceeded to deem the animation in question to be allowable despite the fact that it depicted decedent Delorme as unarmed and stationary, contrary to the evidence. *Id.*, at 6. The Court reasoned that because the animation depicted the scene based on objective data, the animation passed muster, without attempting to address why an exception to the proscription against depicting human action in an animation should apply to this case. *Id.*

Given the Court of Appeals' relative silence on the matter, Pugh must presume the Court of Appeals would acknowledge an exception in a pedestrian/vehicle case. Obviously, if one were to allow an animation in a pedestrian/vehicle case, some depiction of the pedestrian, a human, would be required.

Pugh would respectfully contend the Court of Criminal Appeals should affirm that depiction of human action in an animation is strictly proscribed even in pedestrian/vehicle cases because of its speculative nature. To the extent the Court of Criminal Appeals sees fit to acknowledge an exception, Pugh would respectfully posit the Court should confine the exception to cases where three criteria are met.

First, the evidence and other visual aids should be inadequate to show the jury what happened, unlike the instant case. Second, the depiction of human action should have substantial basis in the evidence, rather than be speculative or flatly contradict the evidence, as here. Finally, the trial court should give a very specific instruction that the jury is not to consider the depiction of human action in the animation to be evidence, but must follow the evidence with respect to the conduct of the human actor depicted in the animation.

ARGUMENT AND AUTHORITIES

Issue One Restated

The Court of Appeals erred in holding the trial court acted within its

discretion when it allowed the State to introduce three animations to the jury which depicted the decedent Delorme as unarmed and stationary, contrary to the evidence.

Argument and authorities for Issue One

With respect to animations involving animate objects, the Texas Court of Criminal Appeals has said, " [a]ny staged, re-enacted criminal acts or defensive issues involving human beings are impossible to duplicate in every minute detail and are therefore inherently dangerous, offer little in substance and the impact of re-enactments is too highly prejudicial to insure the State or the defendant a fair trial." *Miller v. State*, 741 S.W.2d 382, 388 (Tex.Crim.App.1987). (quoting *Lopez v. State*, 651 S.W.2d 413, 414 (Tex.App.-Fort Worth 1983), opinion withdrawn by *Lopez v. State*, 667 S.W.2d 624 (Tex.App.-Fort Worth 1984), which opinion was reversed on other grounds, *Lopez v. State*, 664 S.W.2d 85 (Tex.Crim.App.1984)

An appellate court reviews a trial court's ruling on the admissibility of such an exhibit under an abuse of discretion standard. *Coble v. State*, 330 S.W.3d 253, 272 (Tex.Crim.App.2010). The appellate court must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex.Crim.App.2000).

In *Hamilton v. State*, 399 S.W.3d 673, 680 (Tex.App. - Amarillo 2013), *aff'd*, 428 S.W.3d 860 (Tex. Crim. App. 2014), *subsequent pet. ref'd.*, prosecutors offered an animation that purported to recreate the events as seen by an eyewitness.

The animation showed three, nondescript, identical, 3-D figures standing next to a non-descript single level box-like object, representing a building. *Id.* The figures paused for approximately five seconds and then disappeared around the corner. *Id.* Loud gunshots were then heard on the animation, and one of the three figures ran back past. *Id.* at 680-681. Although the eyewitness stated that the animation accurately depicted what she saw, the Amarillo Court of Appeals held that the trial court abused its discretion in admitting the animation. *Id.* at 684. The court noted that “[n]othing in the record . . . supports many of the details contained in the animation.” *Id.* “Those details were provided by nothing more than pure speculation on [the sponsoring officer’s] part.” *Id.* The Amarillo Court of Appeals also noted that nothing in the case law approves the use of speculative animations showing anything more than “documented facts.” *Id.* at 683.

The Court of Appeals in our instant case cited four intermediate appellate cases in which animations had been allowed. *Pugh, supra* at 5-6. However, in none of these cases had the animation depicted human action.

Venegas v. State, 560 S.W.3d 337, 347–48 (Tex. App.— San Antonio 2018, no pet.) (vehicles); *Castanon v. State*, No. 08-15-00225-CR, 2016 WL 6820559, at *3 (Tex. App.—El Paso Nov. 18, 2016, no pet.) (not designated for publication) (same); *Murphy v. State*, No. 11-10-00150-CR, 2011 WL 3860444, at *2 (Tex. App.—Eastland Aug. 31, 2011, no pet.) (mem. op., not designated for publication)

(same); *Mendoza v. State*, No. 13-09-0027-CR, 2011 WL 2402045, at *14–15 (Tex. App.—Corpus Christi June 9, 2011, no pet.) (mem. op., not designated for publication)(scene of incident).

While expressing agreement with the premise of *Miller*, the Court of Appeals held the instant animation was justified because it involved both animate and inanimate objects and the movement of the inanimate objects at least was based on objective data. *Pugh, supra* at 6. Respectfully, this does not appear to be an adequate explanation for a departure of *Miller's* flat proscription of the depiction of human action in a reenactment. Pugh can only conjecture the Court of Appeals feels an exception must be acknowledged in a pedestrian/vehicle homicide.

The Court of Appeals further reasoned that the animation did not attempt to portray Delorme's actions prior to being run over by Pugh's pickup. *Id.* Respectfully, this is not accurate. Kropp made no such qualification in his comments on the animation to the jury. Further, Delorme is clearly depicted as stationary and unarmed while the vehicle makes its path in the animation. (SX-69).

Given how speculative and prejudicial the Court of Criminal Appeals has found reenactments of human conduct to be, Pugh respectfully contends a flat proscription of such depictions is the wisest policy.

However, in the event the Court feels exceptions might exist in a pedestrian-vehicle case, Pugh would urge that the following criteria should be met before such depictions are allowed.

First, the other evidence and visual aids should be inadequate to convey to the jury what happened. The Amarillo Court of Appeals articulated this very well:

[T]he artificial recreation of an event may unduly accentuate certain phases of the happening, and because of the forceful impression made on the minds of the jurors by this kind of evidence, it should be received with caution." *Lopez*, 651 S.W.2d at 414 (quoting *People v. Dabb*, 32 Cal.2d 491, 498, 197 P.2d 1, 5 (1948)). This is especially true where the event sought to be depicted is simple, the testimony adequate, and the animation adds nothing more than a one-sided, manipulated visual image to the mental picture already produced in the mind of the jurors by the oral testimony of an eye-witness who has been subjected to the crucible of cross-examination.

Hamilton, 399 S.W.3d at 683.

Kropp testified that the animation showed that Pugh had sufficient control over the vehicle to negotiate obstacles and had accelerated before striking Delorme (RR6: 172-175). That is a very simple concept that Kropp's oral testimony itself adequately conveys. (RR6: 172-175). Additionally, the jury had over thirty photographs of the scene. (SX-1 – SX-33). There is no reason twelve people of normal intelligence could not grasp Kropp's description of what happened without the aid of an animation.

Second, the depiction of the pedestrian's actions should be consistent with the evidence adduced at trial.

In this case, Pugh was accused of running Delorme over with his car in a bar parking lot. Pugh and his friend Jesse Hambrick had intervened when Delorme had threatened a female bartender, Alex Schkade, with a knife. (RR5: 181). After having left the bar earlier, Delorme came back from across the street, causing apprehension in Pugh's friend Jerry Anderson leading to Anderson's prompt departure. (RR5: 211)

According to Pugh, Delorme came running across the street towards Pugh and Anderson. (RR6: 190). It is undisputed that Pugh ran Delorme over with his car, killing him. (RR5: 216; R.R.6: 193, 215). According to Pugh, Delorme was coming at him with a substantial knife when he floored it. (RR5: 193, 195).

The animation in this case depicts Delorme as stationary and unarmed, as opposed to approaching Pugh with a substantial knife. (SX-69). The depiction of Delorme as stationary and unarmed is not merely a depiction of "documented facts," of which case law approves. See *Hamilton*, 399 S.W.3d at 683. Much worse than that, the depiction of Delorme actually contradicts the only testimony and evidence about Delorme's behavior, his return to the scene, as well as the knife in the parking lot, which being found in the lot apart from Delorme's person affirms Pugh's testimony that Delorme was wielding it. See, e.g., (SX-22), (SX-24) (photographs of knife and sheath at scene); (RR5: 211) (Delorme coming back across the street creating apprehension in Anderson); (RR6: 190) (Delorme

running across the street towards Pugh and Anderson); (RR5: 181) (Hambrick's testimony that he saw Delorme "with a knife going over the bar trying to get to the bartender").

Clearly, this is exactly the kind of animation about a human's appearance, movement, and behavior that are "impossible to duplicate in every minute detail and are therefore inherently dangerous." *Miller*, 741 S.W.2d at 388; *Hamilton*, 399 S.W.3d at 683.

Third, a very specific instruction that the depiction of human action in an animation is not evidence should be required, particularly when the State and proffering expert make no qualifiers about the animation. The instruction given was as follows:

Ladies and gentlemen of the jury, the State has introduced an animation purporting to recreate the events alleged in the indictment. The animation is a visualization of the expert's opinion. It is admitted for the sole purpose of aiding the jury and understanding the events, if any, which happened and may be considered by the jury only to the extent that the jury believes beyond a reasonable doubt that other evidence introduced by the State supports the events as depicted in the animation.

(RR6: 171).

This is a very generic instruction, when one considers the Court of Criminal Appeals' very substantial concern about the inherent danger of depicting human action. *Miller*, 741 S.W.2d at 388.

The following exchange exacerbates the problem:

Q. Okay. And in creating this animation, do you believe the -- do you believe the animation is based on evidence collected from the scene?

A. Yes, ma'am.

Q. Evidence you've gathered yourself; is that correct?

A. Yes, ma'am.

Q. Evidence gathered and analyzed by other professionals?

A. Yes, ma'am.

Q. Being the DNA expert and the medical examiner?

A. Yes, ma'am.

Q. Do you believe the information on the animation is accurate?

A. Yes, ma'am.

Q. Do you believe it will assist the jury in determining what your opinion is of how the scene occurred?

A. I do.

(RR6: 171).

Thus, the State extols the virtues of the animation's accuracy, and nowhere makes any qualifier about its minimization of Delorme's responsibility for the incident. Such a qualifier would greatly minimize the damage of a generic instruction.

At the end of the day, allowing the State to inaccurately depict the deceased in a murder/self-defense case as unarmed and stationary in three animations proffered by a police officer expert is a monumental error, and the Court of Appeals erred in holding otherwise.

CONCLUSION

The Court of Appeals found the depiction of Delorme's actions in three animations to be permissible despite the admonitions of *Miller* and its progeny, proffering only the explanation that the animation's depiction of the accident scene was based on objective data, and without explaining why that would make the trial court's ruling permissible. Pugh's best conjecture is that the Court of Appeals would acknowledge an exception in a pedestrian/vehicle case. For the reasons this Court has adequately articulated in *Miller* decades ago, Pugh would urge against such an exception. To the extent the Court would acknowledge such an exception, it should be permitted only if absolutely necessary for the jury to comprehend the case, only if the human action depicted is supported by the evidence, and with a rigorous and specific limiting instruction by the trial court that the human action depicted is not evidence, as opposed to the generic instruction given in this case. This case is zero for three in meeting such criteria.

PRAYER

Pugh prays this Court reverses the Court of Appeals' decision and remands for harm analysis.

Respectfully Submitted,

/s/Rick Dunbar_____.

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CERTIFICATE OF COMPLIANCE

Pugh's Brief, according to the word count function of counsel for Pugh's word-processing software, contains 5464 words, even **including** those items permitted to be excluded. As this is within the limits established excluding these items, Pugh respectfully certifies compliance.

/s/Rick Dunbar
Rick Dunbar

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2020, a true and correct copy of the above and foregoing was forwarded upon Britt Lindsey and the State Prosecuting Attorney by e-service.

/s/Rick Dunbar
Rick Dunbar

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